Dato' Ahmad bin Yunus v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6(S2)–21–96 OF 1999
AZMEL J
8 NOVEMBER 2001

Public Servants *— Pensions — Residential criterion — Intention to stay permanently in new country — Plaintiff obtained permanent residency status in new country — Exceeding six months absence from Malaysia, whether time of essence — Plaintiff's contribution to country considered — Whether plaintiff lost his status as resident of Malaysia — Pensions Adjustment Act 1980 ss 1(2) & 2*

In this application the plaintiff, a retired goverment servant, sought for a declaration that he, for the purpose of ss 1(2) and 2 of the Pensions Adjustment Act 1980 ('the Act'), is a 'resident of Malaysia' and therefore entitled to all adjustment made and/or to be made in favour of pensioners resident in Malaysia under the Act. The defendant argued that the plaintiff had ceased to be a resident of Malaysia for the following reasons: (i) that the plaintiff was residing in the United Kingdom indefinitely; (ii) that the plaintiff had permanent residency status in the United Kingdom; and (iii) that the plaintiff had exceeded the cut off point of six months absence from Malaysia which was the period that determined the continuance of the status of resident of Malaysia. The issue for determination was whether or not the plaintiff had lost his 'resident of Malaysia' status while staying in the United Kingdom.

Held, allowing the application with costs:

(1) The intention of the person to stay permanently in a new country is a very important factor to determine whether he has ceased to be a permanent resident of Malaysia. In the present case, the plaintiff, on the other hand, had clearly indicated to the defendant that he had no intention to stay permanently in the United Kingdom. In his affidavit, the plaintiff said that he would return to Malaysia together with his family as soon as his two children had completed their education in the United Kingdom (see p 292E–F); *K Thomas & Anor v Kerajaan Malaysia* R2–25–22–1995 distinguished.

(2) Since the plaintiff had initially stayed in the United Kingdom in order to protect the Malaysian Government's interest, he should not be in any way penalized for obtaining the permanent residence status in the United Kingdom and staying there for the duration of his children's education. At all time, he had no intention to stay permanently in the United Kingdom. Therefore, to deprive him of his pension adjustment benefits would be very unfair and unjust. The initial reason why he was in the United Kingdom was to assist in safeguarding the Malaysian Government's interest. For such good deed to the nation, the plaintiff should be

A rewarded and not deprived of his existing benefits as in this case (see pp 292I–293B).

(3) The counsel for the plaintiff argued that no specific period has been stated in the Act. This indicates that the legislature did not intend to make time to be of the essence. A case of this nature had B to be decided in accordance with the circumstances and facts of the case. It was not proper for the defendant to use six months absence from Malaysia as the cut off point to determine whether a person had ceased to be a permanent resident of Malaysia. By so doing, it would cause immense injustice and unfairness (see p 292A, C).

C

[**Bahasa Malaysia summary**

Di dalam permohonan ini, plaintif, seorang kakitangan kerajaan yang telah bersara, telah membuat permohonan untuk deklarasi bahawa D beliau merupakan pemastautin di Malaysia bagi tujuan ss 1(2) dan 2 Akta Penyelarasan Pencen 1980 ('Akta tersebut') dan dengan itu, berhak memperolehi segala pelarasan yang dibuat atau pelarasan yang akan dibuat untuk semua pesara yang bermastautin di Malaysia di bawah Akta tersebut. Defendan telah menyatakan bahawa plaintif berhenti daripada menjadi pemastautin di Malaysia atas sebab-sebab E berikut: (i) plaintif sedang menetap di United Kingdom bagi tempoh masa yang tidak pasti; (ii) plaintif mempunyai status pemastautin tetap di United Kingdom; dan (iii) plaintif telah melampaui tempoh masa enam bulan ketiadaan di Malaysia, iaitu tempoh masa yang menentukan status pemastautin di Malaysia. Isu untuk ditentukan adalah sama ada plaintif telah kehilangan statusnya sebagai F 'pemastautin di Malaysia' semasa beliau menetap di United Kingdom.

Diputuskan, membenarkan permohonan dengan kos:

(1) Niat seseorang untuk tinggal dengan tetap di sebuah negara baru G merupakan faktor yang sangat penting dalam menentukan sama ada beliau berhenti dari menjadi pemastautin tetap Malaysia. Di dalam kes ini, plaintif telah memberitahu defendan dengan jelas bahawa beliau tidak berniat untuk tinggal tetap di United Kingdom. Di dalam afidavitnya, beliau menyatakan bahawa H beliau akan pulang ke Malaysia bersama keluarga beliau setelah kedua-dua anak beliau tamat pendidikan mereka di United Kingdom (lihat ms 292E–F); *K Thomas & Anor v Kerajaan Malaysia* R2–25–22–1995 dibeza.

(2) Memandangkan bahawa plaintif telah menetap di United Kingdom untuk melindungi kepentingan Kerajaan Malaysia, I beliau tidak sepatutnya dihukum kerana memperolehi status pemastautin tetap di United Kingdom dan tinggal di sana sehingga penamatan pendidikan anak-anaknya. Sepanjang masa

ini, beliau tidak berniat tinggal dengan tetap di United Kingdom. Oleh yang demikian, untuk merampas faedah pelarasan pencennya adalah tidak adil dan saksama. Sebab awal beliau berada di United Kingdom adalah untuk menolong menjaga kepentingan Kerajaan Malaysia. Plaintif sepatutnya diberi ganjaran dan bukan dirampaskan faedahnya kerana melakukan perbuatan yang baik ini (lihat ms 292I–293B).

(3) Peguam bagi pihak plaintif mengatakan bahawa tidak terdapat tempoh masa yang khusus dalam Akta tersebut. Ini menunjukkan bahawa badan perundangan tidak berniat menjadikan masa sebagai intipati. Kes seperti ini hendaklah diputuskan menurut keadaan dan fakta kes. Defendan tidak betul dalam menggunakan ketiadaan plaintif selama enam bulan sebagai tempoh untuk seseorang dihentikan daripada menjadi pemastautin tetap Malaysia. Dengan berbuat demikian, ia sangat tidak adil dan tidak saksama (lihat ms 292A, C).]

Notes

For a case on the residential criterion in pensions, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) para 1744.

Cases referred to

K Thomas & Anor v Kerajaan Malaysia R2–25–22–1995 (distd)

Legislation referred to

Pension Adjustment Act 1980 ss 1(2), 2

N Sivananthan (*Sivananthan*) for the plaintiff.
Mohamad Naser bin Disa (Senior Federal Counsel) for the defendant.

Azmel J: In this application the plaintiff sought for a declaration that he, for the purpose of ss 1(2) and 2 of the Pensions Adjustment Act 1980 ('the Act'), is a '*resident of Malaysia*' and therefore entitled to all adjustment made and/or to be made in favour of pensioners resident in Malaysia under the Act.

The plaintiff had served the Government for a continuous period of 32 years and ten months. He retired from government services on 25 November 1983 upon reaching the age of 55 years. Immediately upon his retirement, he was sent to Hertford, United Kingdom to work as a consultant with the Palm Oil Research Institute of Malaysia ('PORIM') at its laborator at Makmal Tun Razak. He left the job on 30 September 1991. However, the plaintiff continued to remain in the United Kingdom mainly because his children were still studying in that country. It was solely for that purpose, he obtained a permanent resident status in the United Kingdom. However, it had always been his intention to return to Malaysia as soon as his two children completed their studies in the United Kingdom. It would

A appear, therefore, that his stay in the United Kingdom would determine upon the completion of his two children's education in that country.

On his retirement, the plaintiff, even though staying in the United Kingdom, was accorded the full pension adjustment benefits of the Act. He continued to receive the same until 1 December 1997 when the government withdrew such pension adjustment benefits. It was a requirement of the Act that in order for a pensioner to enjoy such pension adjustment benefits he must be a 'resident of Malaysia'. With the withdrawal of such benefits, the plaintiff's monthly pension was reduced by RM610. It was for that reason that the plaintiff brought this action to court. The only issue for determination is whether or not the plaintiff had lost his 'resident of Malaysia' status while staying in the United Kingdom.

The term 'resident of Malaysia' is defined in s 2 of the Act. It reads as follows:

> '*resident of Malaysia*' means being habitually resident in Malaysia as evidenced by the person concerned having his sole and principal place of abode in Malaysia and residing therein for such period or periods of time as is inconsistent with the continuity of residence in Malaysia and as point to durable ties between him and Malaysia.

The defendant gave three reasons why the plaintiff had ceased to be a resident of Malaysia. They are:

(1) that the plaintiff is residing in the United Kingdom indefinitely;

(2) that the plaintiff had permanent residency status in the United Kingdom; and

(3) that the plaintiff had exceeded the cut off point of six months absence from Malaysia which is the period that determines the continuance of the status of resident of Malaysia.

In respect of the first ground, the plaintiff said that it is not true that his stay in the United Kingdom was for an indefinite period. As a matter of fact the plaintiff, had informed the defendant that his stay in the United Kingdom would cease as soon as his children completed their education in the United Kingdom. After that the plaintiff and his family would return to Malaysia permanently. Hence, it was not true that the plaintiff wanted to stay permanently or for an indefinite period in the United Kingdom.

As to the second ground, the counsel for the plaintiff argued that a person can have permanent resident in two countries simultaneously. The defendant had admitted that the plaintiff was resident of Malaysia between the period of 1983 and 1997 even though at the same time the plaintiff was also having permanent residence status in the United Kingdom. Therefore, having the permanent residence status in the United Kingdom should not be a proper yardstick to conclude that the plaintiff had ceased to be a resident of Malaysia.

With regard to the third ground, the counsel for the plaintiff argued that making the period of six months absence as the cut off point to determine whether a person has ceased to be a permanent resident of Malaysia was too

arbitrary and grossly unfair. The counsel for the plaintiff argued that no specific period has been stated in the Act. This indicates that the legislature did not intend to make time to be of the essence. Therefore, the determination of the continuance of the status of resident of Malaysia should be decided based on the circumstances of each particular case. The learned counsel for the plaintiff gave an example of a pensioner who goes abroad on a three year course and not returning at all during that period. If the formula of being absent from Malaysia for six months is to be applied then the pensioner would be considered to have lost his status as permanent resident of Malaysia. As such, to use the cut off point of six months absence from Malaysia is most unfair and unjust and cannot be the intention of the legislative.

I fully agree that a case of this nature has to be decided in accordance with the circumstances and facts of the case. I also feel that it was not proper for the defendant to use six months absence from Malaysia as the cut off point to determine whether a person has ceased to be a permanent resident of Malaysia. By so doing, it would cause immense injustice and unfairness. In my view, one of the factors that must be considered before concluding whether a person who stays away from Malaysia has ceased to be a resident of Malaysia is when he intended to remain in another country permanently. In the unreported case of *K Thomas & Anor v Kerajaan Malaysia* R2–25–22–1995 which was heard before me, the plaintiffs had clearly stated that they went to Canada with the intention to stay there permanently. In that case, because of their clear *intention* to stay in Canada permanently, I arrived at the conclusion that they had lost their status as permanent residents of Malaysia. In my view, intention of the person to stay permanently in a new country is a very important factor to determine whether he has ceased to be a permanent resident of Malaysia. In the present case, the plaintiff, on the other hand, had clearly indicated to the defendant that he had no intention to stay permanently in the United Kingdom. In his affidavit, the plaintiff said that he would return to Malaysia together with his family as soon as his two children had completed their education in the United Kingdom.

In addition to that, I have also considered the special circumstances of the plaintiff's case. The plaintiff, immediately after his retirement, was asked to work in the United Kingdom for the sole purpose of safeguarding the interest of the Government of Malaysia, ie to counter the American Soyabean Association's campaign of misinformation against Malaysia palm oil. Because he was working in the United Kingdom for a reasonably long period of time, his wife and children had to be with him. It would only logical that his children would have to pursue their education in the United Kingdom. His reason to obtain a permanent residence status in the United Kingdom must have been solely to facilitate his children's education because without such status, the costs of education of his children would be very expensive. However, when his employment with PORIM ended in 1991, his children still had not completed their education yet. He had to continue to stay in the United Kingdom in order to enable his children to complete their education there. As a permanent resident of the United Kingdom, the education fees were affordable. In my view, since the plaintiff

had initially stayed in the United Kingdom in order to protect Malaysian Government interest, he should not be in any way penalized for obtaining the permanent residence status in the United Kingdom and staying there for the duration of his children's education. At all time, he had no intention to stay permanently in the United Kingdom. Therefore, to deprive him of his pension adjustment benefits would be very unfair and unjust. The initial reason why he was in the United Kingdom was to assist safeguarding Malaysian Government's interest. For such good deed to the nation, the plaintiff should be rewarded and not deprived of his existing benefits as in this case.

For the reason as I have stated above, I allowed the plaintiff's application as per prayer one of the originating summons. I also ordered that costs of this suit be awarded to the plaintiff.

Application allowed with costs.

Reported by Ezatul Zuria Azhari